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Supreme Court, U.S.
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No. (1)

IN THE

Supreme Court of the United States

ARIEL GUTIERREZ-RODRIGUEZ,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether and to what extent bad business judgments and contractual non-performance should be subject to criminal prosecution for fraud without corresponding proof of an intent not to perform.

PARTIES TO THE PROCEEDING

The names of all parties to the proceeding in the United States Court of Appeals for the First Circuit are:

Lorenzo Munoz-Franco,

Dr. Francisco Sanchez-Aran,

Ariel Gutierrez-Rodriguez,

Wilfredo Umpierre-Hernandez, and

The United States.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit is reported at 487 F.3d 25 (1st Cir. 2007), and is attached as Appendix "A". A copy of the Order denying rehearing entered on July 20, 2007, is attached as Appendix "B". An Errata Sheet substantively amending the First Circuit Opinion was entered nunc pro tunc on July 25, 2007, and is attached as Appendix "C". The underlying Judgment entered by the U.S. District Court of Puerto Rico against Petitioner Ariel Gutierrez on March 4, 2004, is attached as Appendix "D".

JURISDICTION

The date on which the United States Court of Appeals for the First Circuit decided this case was May 22, 2007. A timely petition for panel rehearing or rehearing en banc was denied by the First Circuit on July 20, 2007. Judgment was issued as a mandate on July 27, 2007. The petition is timely filed pursuant to S. Ct. Rule 13.1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V, U.S. Constitution: "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law . . .."

18 U.S.C. § 1344
18 U.S.C. § 371
18 U.S.C. § 657

STATEMENT OF THE CASE AND FACTS

I. PROCEDURAL HISTORY

The original indictment in this case was brought on November 22, 1995, alleging acts as early as 1980 or before, and focusing primarily on events occurring at a time of severe recession and economic crisis in Puerto Rico and throughout the United States. This prosecution was very much a product of the business failures of the 1980s. The indictment was changed several times thereafter. Trial began with jury selection in November 2000, and concluded in May 2002, with jury verdicts of guilty against four defendants – Lorenzo Munoz-Franco; Dr. Francisco Sanchez-Aran; Ariel Gutierrez-Rodriguez; and petitioner Wilfredo Umpierre-Hernandez – on charges of bank fraud (18 U.S.C. § 1344), conspiracy (18 U.S.C. § 371) and misapplication of bank funds (18 U.S.C. § 657). Petitioner's brother Enrique Gutierrez, who co-owned the Gutierrez' companies with Petitioner, was acquitted of all charges. Sentencing proceedings concluded on February 12, 2004. The court sentenced Munoz-Franco and Sanchez-Aran to guideline sentences of 46 months imprisonment, Gutierrez to 37 months imprisonment, and Umpierre to 24 months imprisonment (and sentenced the first three defendants as well to a concurrent pre-guidelines sentence on misapplication of 60 months, and Umpierre of 24 months). The Court also imposed fines ranging up to $60,000.

The defendants, including Petitioner, timely filed appeals with the First Circuit. Oral Argument occurred on December 6, 2006. The

First Circuit affirmed the convictions in a 97-page opinion on May 22, 2007. See United States v. Munoz-Franco, 487 F.3d 25 (1st Cir. 2007). The defendants sought panel rehearing and rehearing en banc, but the First Circuit denied these petitions on July 20, 2007. On July 25, 2007, the Court entered its Errata Order. On August 1, 2007, the First Circuit granted a stay of the Court's mandate pending Supreme Court review.

II. STATEMENT OF THE FACTS[1]

Caguas Central Federal Savings & Loan ("Caguas") operated as one of the largest thrifts in Puerto Rico until it was closed by federal regulators in May 1990. Lorenzo Munoz-Franco was President and Dr. Francisco Sanchez-Aran was Executive Vice-President of Caguas throughout the 1980s. Ariel Gutierrez and his brother Enrique Gutierrez owned certain companies, including Transglobe Corporation and Modules Manufacturing Inc., which built and installed modular homes. JA-T-1622-25. Wilfredo Umpierre was an employee of these companies. Beginning in the 1970s and through 1984, Gutierrez' companies received substantial construction loans from Caguas for projects that these companies were developing. In the early years, Gutierrez' companies received millions of dollars in loans and successfully constructed and delivered thousands of homes. JA-T-0799-801. By

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[1] Citations to the record below refer to "JA", meaning the Joint Appendix Petitioner and his Co-Appellants filed with the First Circuit and which included, inter alia, excerpts of trial transcripts.

the early 1980s, these successes stopped as the Island's recession worsened. Between 1984 and 1986 the Gutierrez' projects were sold to third parties and the respective loans were novated between the Bank and the purchasers. Gutierrez companies remained as contractors for some of the purchasers and maintained a lending relationship with the Bank strictly as contractors. By the end of 1986, the Gutierrez companies themselves had been sold and resold. JA-T-3547-50. In 1987, all lending relationships between the Bank and the Gutierrez brothers had ceased and in fact, by that date, the Bank and Petitioner were suing each other. JA-T-1913-14.

By 1990, the loans on many of the projects with which the Gutierrez brothers had been previously associated were millions of dollars in arrears. The manufacturing companies' debt to Caguas had grown from $6 million in 1986 (the year in which Gutierrez had sold the companies) to $40 million in 1990. At the time it was closed, Caguas had numerous other non-performing loans as well, including more than $20 million in debt relating to another developer, Francisco Mirandes. See, e.g., JA-T-0804-05, -1736-37; JA-E-1024-25, -1028.

Much of the Government's evidence at trial focused on the bankers and banking decisions made inside Caguas, and on what was and was not disclosed by the banker defendants to Caguas' Board of Directors and to the federal regulators. As to the bank outsiders, Petitioner and Umpierre, the Government proved merely that Caguas was a bank that suffered problem loans, workout issues,

and regulatory shortcomings from as early as the late 1970s; that companies owned for a time by Ariel Gutierrez and others obtained loans from Caguas and signed contracts to build homes on projects, received payments, and failed to timely deliver and install the requisite number of houses; that Ariel Gutierrez and others signed certifications seeking payments pursuant to contracts and bank procedures; and that the loans relating to these projects, and to the companies Ariel Gutierrez and others owned, resulted in large losses for Caguas. See, e.g., JA-T-2100, -2420, -3569.

One of Caguas' first construction loans during the relevant period to companies related to Gutierrez and Umpierre was the La Marina project (specifically sections 9-12 of that project; the previous eight sections had already been built, sold and delivered by Gutierrez-held companies; and all homes were eventually constructed and installed on sections 9-11; only on section 12 were no homes delivered). JA-T-0079-80. The La Marina loan was executed on June 25, 1980. Id. Another project, Levittown Plaza, was the subject of a Caguas loan executed on January 30, 1981, and another loan for the Quintas de Country Club project was executed on March 31, 1982. JA-T-0143-44, -0174. On these loans, the construction schedule was not met, and interest payments (of at least $1.5 million on La Marina and Country Club alone) were taken from the loan proceeds to maintain the repayment schedule. JA-T-0085-86, -0089, -0241-42. Moreover, on all of these loans, various amounts were transferred to and from other Gutierrez-related projects, and the

transferred amounts were used for loan repayments, consistent with the terms of a master loan agreement between the Gutierrez companies and Caguas which cross-collateralized all the loans. See, e.g., JA-T-0093-94, 0162-63, -0178-79. The loans were repaid on October 29, 1984, by the DOW Group (not owned by, controlled by or related to Gutierrez or Umpierre), which obtained new loans from Caguas for the projects, and closed out the Gutierrez loans. JA-T-0096-99, -0159-60, -0243-44. After that date, Gutierrez and Umpierre (and companies affiliated with them) had no construction loans with Caguas; they continued to serve as contractors on other projects financed by Caguas through other borrowers through 1986.

The contractor projects in issue were Los Caciques (where Caguas executed a loan to developer Enrique Santiago on August 23, 1985, see JA-T-0381); Jardines de Villa Alba (where Caguas executed a loan to developer Emilio Montilla on August 23, 1985, see JA-T-0285-86); Los Mameyes (involving an emergency contract for homes for flood victims with the Puerto Rico Department of Housing and Development, see JA-T-0864-65); and Cerrovista (where Caguas executed a loan to developer Walter Frambes on September 29, 1986, see JA-T-0467-69). Construction delays occurred on these projects as well and these loans, like the others fell into arrears.

Payments to Gutierrez companies on the various projects were made through Caguas' certification process. JA-T-0072-73. The

Government's theory at trial was that the certifications were false, since monies were advanced ahead of work performed. While this argument arguably fit conventional home construction, where additional monies are funded upon certification that previous phases of work are completed, it did not fit modular home construction, which is more akin to a commercial credit line covering pre-manufacturing and manufacturing work being preformed at the plant, and where installation of pre-constructed housing came at the end of the process. Moreover bank employees were aware that money was advanced ahead of final installation, and bank inspectors went both to project sites and to the plant (where work on Modular units was ongoing) prior to approving certifications. Nor did any payments to Gutierrez companies ever exceed the amounts provided for in the loan agreements and construction contracts. Nor was there any testimony that Petitioner or Umpierre thought that the certifications submitted were false. See, e.g., JA-P-1302-16, -1323-35; JA-T-1941-44, -2592-94, -1490-91, -1501-04, -0848-50, -1095-96. It turned out, however, that more money was paid than manufactured homes were assembled and installed on sites. Effective December 31, 1985, Gutierrez sold Modules to Sergio Camero, remaining thereafter as an employee of Modules; Modules was sold again in late 1986 to Enrique Santiago, and Petitioner and Umpierre left the employ of Modules by early 1987. JA-T-1692-93, -2125-27, -3386-87.

III. REASONS FOR GRANTING THE WRIT

A. The Government Criminalized What Were At Most Bad Business Judgments, And The First Circuit's Affirmance Is At Odds With What Other Circuits Require To Sustain Business Crimes Convictions

It is well established that inaccurate business forecasts and poor business conduct do not automatically rise to the level of criminally fraudulent behavior. See generally United States v. Berheide, 421 F.3d 538, 540 (7th Cir. 2005); United States v. Handakas, 286 F.3d 92, 107 (2d Cir. 2002); United States v. Hodge, 150 F.3d 1148 (9th Cir. 1998); United States v. Brown, 79 F.3d 1550, 1562 (11th Cir. 1996); United States v. Shah, 44 F.3d 285, 293 n.14 (5th Cir. 1995); United States v. D'Amato, 39 F.3d 1249, 1261 n. 8 (2d Cir. 1994); United States v. Kreimer, 609 F.2d 126, 128 (5th Cir. 1980); Steiger v. United States, 373 F.2d 133 (10th Cir. 1967).

The First Circuit's affirmance in the instant case amounts to a holding that a mere breach of contract and non-performance is enough to impose criminal liability. In this case, there was no evidence that, at the time Caguas loaned money for the development of various Gutierrez projects, Ariel Gutierrez intended that his companies not perform. See e.g. JA-T-2420(10-23-01-Tr-80, 93-94). Rather, all that the evidence showed was non-performance: projects fell behind schedule; disputes arose between developers and contractors; fewer houses were assembled and installed on sites than what the development contracts provided; and Caguas loans went unpaid and interest owing on

the monies funded grew exponentially. See e.g. JA-T-3569(5-6-02-Tr-58, 65, 106); JA-T-2100(7-23-01-Tr-25). The prosecutors harped on the non-performances, the failure to build homes, and the contract breaches throughout trial. See e.g. JA-T-0070(1-30-01-Tr-104-108); JA-T-0146(2-5-01-Tr-21-25); JA-T-0165(2-6-01-Tr-92-99); JA-T-0331(2-14-01-Tr-3-8); JA-T-0379(2-22-01-Tr-105-106); JA-T-0490(2-28-01-Tr-51-54); JA-T-1294(5-7-01-Tr-43-50); JA-T-2100(7-23-01-Tr-2-10); JA-T-2175(8-14-01-Tr-9-19).

The First Circuit's Opinion cites these non-performances as evidencing Ariel Gutierrez' guilt. 487 F.3d at 44-45. Bad intent must be shown for fraud, however, and intent cannot be assumed from mere failure to perform or mistaken assessments of projects' viability. The gravamen of the instant prosecution, that monies were ultimately over-disbursed because more money was advanced than homes assembled and finished, is akin to arguments other Circuit Courts have rejected in business crimes prosecutions.

United States v. Hodge, supra, is instructive. Hodge, an atomic physicist, was convicted for wire fraud and false statements in connection with certifications for payment he submitted to the National Science Foundation ("NSF") as an NSF grantee. Although Hodge personally received in excess of $250,000, his project was never completed. The Ninth Circuit was troubled by the government's theory of prosecution and reversed, saying:

> That Hodge sadly failed to carry out the research he proposed is evident. That Hodge had a moral obligation not to take the grant money and a moral obligation to return what he took does not need demonstration. That the government could have sued Hodge civilly for unjust enrichment is undisputable. That Hodge presented a case where the government could show how tough the government can be with a nonperforming grantee is clear. What is not evident is Hodge's crime or crimes.

150 F.3d at 1151. See also United States v. Gatewood, 173 F.3d 983, 987-88 (6th Cir. 1999) (ambiguously worded certifications simply not a crime); United States v. Sun-Diamond Growers of California, 138 F.3d 961, 973 (D.C. Cir. 1998) ("not every breach of fiduciary duty works a criminal fraud"); United States v. Butler, 822 F.2d 1191, 1197 (D.C. Cir. 1987) (cautioning against finding fraud by ex post evaluation of what originally might have been passable business judgment).

In Soper v. Simmons International, Ltd., 632 F. Supp. 244 (S.D.N.Y. 1986), a civil RICO action was brought in connection with a failed joint venture. The court noted that "mere failure of a promised performance has never permitted a factual finding that defendants never intended to perform." Id. at 249 (citation omitted). The court also observed that, "[a]lthough one who makes a contractual promise with the undisclosed intention to breach it can be held liable for fraud, proof of

such intention must be based on more than a mere showing of nonperformance." Id. (citing, among other cases, Cauble v. Mabon Nugent & Co., 594 F. Supp. 985, 993 (S.D.N.Y. 1984), and Federal Deposit Insurance Corp. v. Borne, 599 F. Supp. 891, 895 (E.D.N.Y. 1984)).

The First Circuit itself has acknowledged this principle in civil cases. In Jaron v. Frank, 227 F.2d 277 (1st Cir. 1955), for example, the Court indicated that a breach of contract could not constitute common-law fraud absent a "contemporaneous undisclosed purpose" not to honor the contract. Id. at 280. Similarly, in Keeler v. Fred T. Ley & Co., 65 F.2d 499 (1st Cir. 1933), the Court found it "well-established" that "failure to perform a promise cannot amount to fraud" absent evidence that the promise was made with no intention to perform. Id. at 501. See also In re Lane, 1995 U.S. App. LEXIS 5510, *8-9 (1st Cir. Mar. 20, 1995) ("[M]ere failure to perform is not sufficient evidence of scienter nor is subsequent conduct contrary to the original representation necessarily indicative of fraudulent intent.").

The Eleventh Circuit's ruling in United States v. Brown, supra, is particularly apposite. The Court in Brown reversed the convictions, even though it assumed that the defendants "approved and promoted lies about the investment potential of GDC homes," when it was unreasonable for purchasers to accept those lies and not conduct independent inquiry. 79 F.3d at 1558, 1562. The Court declined "'to adopt a construction making the difference between legal and illegal conduct in the field of business relations depend upon so

uncertain a test as whether prices are reasonable,'" calling the government's contention that the convictions were based on "deceptions about high prices" and not on overcharging a "distinction without meaning." Id. at 1562 (quoting U.S. v. Trenton Potteries Co., 273 U.S. 392, 398 (1927)).

Steiger v. United States, 373 F.2d 133 (10th Cir. 1967), is also instructive. There, the court found that the defendants were entitled to a "good faith" instruction that sincere belief in the enterprise in question was a defense: "The fact that the scheme, viewed in retrospect, would be regarded as impractical and visionary by reasonable persons or ordinary judgment and prudence does not defeat . . . good faith, if the defendant . . . actually believed that the plan was practical and would succeed." Id. at 136. See also FDIC v. St. Paul Fire & Marine Ins. Co., 942 F.2d 1032, 1036 (6th Cir. 1991).

In McNally v. United States, 483 U.S. 350 (1987), this Court analyzed the proper scope of the mail fraud statute, 18 U.S.C. § 1341. That case involved the prosecution of public and private figures for participating in a self-dealing patronage scheme where hundreds of thousands of dollars were secretly funneled to public officials in Kentucky. The prosecution was premised on the theory that it was a mail fraud to deprive Kentucky citizens of the honest services of public officials. Jury convictions ensued, and the Court granted certiorari to review whether the mail fraud jury instructions allowed the jurors to convict for conduct that was not a crime.

The Court reversed the convictions, stating that it did not want to leave the outer boundaries of prosecutable mail fraud ambiguous and holding that mail fraud was limited to deprivations of property rights. Id. at 360. The Court acknowledged that the legislative history of the mail fraud statute was scant, and it identified an early codification that was armed at preventing frauds in the large cities by "'thieves, forgers, and rapscallions generally, for the purpose of deceiving and fleecing innocent people . . .." Id. at 356. The Court cited Hammerschmidt v. United States, 265 U.S. 182, 188 (1924), which noted that "the words 'to defraud' commonly refer to 'wrongdoing one in his property rights by dishonest methods or schemes,' and 'usually signify the deprivation of something of value by trick, deceit, chicane or overreaching.'" 483 U.S. at 358-59. The Court also cited Durland v. United States, 161 U.S. 306 (1896), an early case construing mail fraud where the Court accepted that mail fraud could reach past, present, or future promises and where the conviction was sustained because the defendant sold bonds he did not intend to honor. McNally, 483 U.S. at 356-57.

The dissent in McNally is equally instructive. Justice Stevens spoke of fraud in its elementary common law sense of deceit, id. at 374, and went on to observe that there have been over-expansive applications of § 1341 in the past, and that "the Courts of Appeals have struggled to define just when conduct which is clearly unethical is also criminal." Id. at 376.

It is exactly this struggle that supports the granting of certiorari in the case at hand.

A conviction for fraud-based offenses requires proof of scienter. The bank fraud statute in this case, like mail and wire fraud, proscribes participating in a fraud scheme knowingly and willfully. To act knowingly is to act purposefully and not out of mistake or accident. To act willfully is to act with bad intent, specifically intending to do something the law forbids. Proof of intent in fraud cases is often circumstantial.

Where fraud charges arise out of a business gone awry, such as non-performance or contract breach, it is clear that the government must prove an intent not to perform at the time promises were made and monies were paid. See e.g. Jaron v. Frank, supra, 227 F.2d at 280. But where juries are told that circumstantial evidence of intent is enough, what sort of proof is required?

For certain it should not be the facts of breach or evidence of performance failures, particularly in times of economic hardships and market downturns such as existed in the Puerto Rico housing and banking industries in the 1980s. Yet in the instant prosecution that is exactly what the Government featured. The jury heard that Gutierrez companies took money and did not timely install the requisite number of homes pursuant to contract. The jury heard that Caguas "over-disbursed" monies, in relation to homes installed. The jury heard these disbursements occurred through certification forms that Caguas utilized (and that were signed by Petitioner or

Umpierre, approved by bank inspectors, authorized by the developer, and signed off on by a bank officer). The jury heard that Caguas often applied monies it was disbursing to other Gutierrez loans. The jury heard all this repeatedly throughout fifteen (15) months of trial.

What the jury did not hear about and what the prosecution could not prove were any conversations where Petitioner said he did not intend his companies to perform; or where Petitioner said he did not believe the information reported in certifications was accurate; or where Petitioner spoke with or met with the banker defendants or others regarding cheating Caguas; or where Petitioner took any money for personal gain. The jury did not hear that Gutierrez contract terms were unreasonable or that Gutierrez contract projections were false. The jury did not hear that Petitioner ever provided Caguas false financial or contract information. Unlike the Durland case, there was no evidence of any promise Petitioner did not intend to honor.

The First Circuit's opinion affirming the convictions here ignores the absence of evidence that Petitioner intended not to honor his promises, and it completely ignores the issue of bad business judgments not constituting fraud. Almost entirely, the Court of Appeals focuses on the conduct of the bank insiders, the non-disclosures to Caguas' Board of Directors, the absence of Board approval for what Defendants Munoz-Franco and Sanchez-Aran did within the bank, as well as these men's misrepresentations to bank regulators. See e.g. 487 F.3d at 31. To the extent the Court of Appeals

opinion discusses Petitioner, it merely cites to performance failures and payments for work not completed. Id. at 44-45 (failing to clearly distinguish between the acts of Petitioner "and Umpierre-Hernandez," and of Petitioner alone).

Most telling is the Court's "Errata Sheet" filed on or about July 25, 2007, which corrected the court's factual analysis of the evidence against Petitioner. The court retreated from statements that no houses were built, and in particular struck language that Petitioner endorsed checks, substituting the following:

> A jury also could infer that Gutierrez and Umpierre-Hernandez aided and abetted Munoz-Franco and Sanchez-Aran in the [Cerrovista] transaction: Umpierre negotiated the transaction involving the sale of Cerrovista, and the funds were used to pay down loans held by companies that Gutierrez owned and supervised.

What the Court of Appeals seems to be endorsing is guilt by vicarious liability for the actions of others that benefit corporate entities in which a defendant has interests! Indeed, to hold a company principal criminally responsible for a company's breach of contract and to use the fact that the company (and not the individual) benefited as sufficient evidence from which to infer guilt is wrong-minded and dangerous. Yet that is exactly what the trial court's jury instructions and the First Circuit's view of proof of fraud allowed as to Petitioner.

The only findings of deceit in this case made by the trial court and the First Circuit went to the failures of the bank insiders to inform the Caguas Board of Directors and the regulators about the various loans and projects the insiders had approved. References to non-disclosures and incomplete or misleading information abound, but not directed to Petitioner. And imputing the conduct of the bank insiders to Petitioner under conspiracy law depended upon wrongly inferring Petitioner's agreement and knowing joinder in the alleged fraud scheme based on the non-performances and contract breaches Petitioner's companies experienced; and the notion that Petitioner, as co-owner of these companies, benefited from the lending decision made by the bank insiders.

In United States v. Brown, supra, the Eleventh Circuit quoted Sir Thomas More's speech in "A Man For All Seasons" that "'[t]he law is a causeway upon which, so long as he keeps to it, a citizen may walk safely.'" 79 F.3d at 1562. The court went on to observe:

> To be free of tyranny in a free country, the causeway's edges must be clearly marked. The exercise of federal government power to criminalize conduct and thereby to coerce and to deprive persons by government action, of their liberty, reputation and property must be watched carefully in a country that values the liberties of its private citizens. Never can we allow federal prosecutors to make up the law as they go along. . . .

> Construing the evidence at its worst against defendants, it is true that these men behaved badly. We live in a fallen world. But "bad men, like good men, are entitled to be tried and sentenced in accordance with law." Green v. U.S., 365 U.S. 301, 309 (1961) (Black, J. dissenting). And, the fraud statutes do not cover all behavior which strays from the ideal . . ..

Id. The Second Circuit in United States v. Handakas, supra, reversed the mail fraud convictions of the owner of a construction company accused, inter alia, of violating wage rate laws and reporting requirements in construction contracts awarded to the company for work on New York City schools, saying that to do otherwise would "effect a breathtaking expansion of mail fraud" where "every breach of a contract or state law (committed in the vicinity of a telephone) and every false state tax return (sent by mail) would become punishable as a felony in federal court. 286 F.3d at 107.

The First Circuit's affirmance here does what the Second Circuit warned against in Handakas and the Eleventh Circuit in Brown – it threatens a "breathtaking expansion" of the fraud statutes.

The Court's approach in Chiarella v. United States, 445 U.S. 222 (1980), also is apposite. Chiarella involved the Section 10b-5 conviction of a printer of take over bids who used the information he received to purchase stock in the target companies. The defendant was convicted on a

theory that his failure to disclose what he was doing was fraud. The Court overturned the conviction, finding that there was no duty to disclose and no fiduciary relationship violated and hence no fraud. Id. at 228. The Court declined a broad fraud approach where any user of material information not generally available to the public could be subject to prosecution under § 10(b): "not every instance of financial unfairness constitutes fraudulent activity . . .." Id. at 232 (citation omitted).

Petitioner in the instant case appears to have been convicted for the very financial unfairness that Chiarella warns does not qualify as fraudulent behavior. See also United States ex rel. Bettis v. Odebrecht Contractors of Ca., Inc., 393 F.3d 1321, 1327-30 (D.C. Cir. 2004) (finding, under the False Claims Act, that even a mistaken assumption or understanding of a contracting party's legal entitlements does not demonstrate fraud, and that to suggest otherwise would "not [be] a prescription for fair or efficient contracting") (finding also that there is there is no inference of fraudulent intent not to perform from the mere fact that a promise is "ultimately abandoned as unfeasible") (citation omitted).

In recent years, this Court has repeatedly granted certiorari to determine the scope of the federal mail and wire fraud statutes, 18 U.S.C. §§ 1341, 1343. See e.g. Pasquantino v. United States, 125 S.Ct. 1766 (2005) (wire fraud statute includes scheme to defraud foreign government of tax revenues); Cleveland v. United States, 531 U.S. 12 (2000) (state license does not constitute property

for purposes of the mail fraud statute); Neder v. United States, 527 U.S. 1 (1999) (materiality is an element of the mail and wire fraud statutes); Carpenter v. United States, 484 U.S. 19 (1987) (confidential business information constitutes "property" under the mail and wire fraud statutes); McNally v. United States, supra. The Court's focus on these statutes is understandable; they are among the most commonly used weapons in a federal prosecutor's arsenal. In 2003 alone, according to the Federal Justice Statistics Resource Center, 1160 defendants were charged under §§ 1341 and 1343 alone. See http://fjsrc.urban.org.

The Court's decisions this past term also support the granting of certiorari in this case. In Bell Atlantic Corp. v. Twomby, 127 S. Ct. 1955 (2007) and Tellabs Inc. v. Makor Issues and Rights Ltd., 127 S. Ct. 2499 (2007), the Court clarified heightened pleading requirements applicable to antitrust and securities cases, holding inter alia that inferences of scienter sufficient to allege civil securities liability must be more than merely reasonable or permissible but rather cogent and compelling. 127 S. Ct. at 2510. In Leegin Creative Leather Products Inc. v. PSKS Inc., 127 S. Ct. 2705 (2007), the Court overturned the per se rule against resale price maintenance and held that vertical price restraints should be analyzed under the rule of reason, noting, inter alia, that resale price maintenance is not always anti-competitive and that the economics literature was replete with pro-competitive justifications for a manufacturer's use of resale price maintenance. Id. at 2708. In Credit Suisse Securities (USA) LLC v. Billing, 127 S. Ct. 2383 (2007), the Court extended antitrust

law pre-emption to claims that underwriting firms marketing and distributing issues had entered unlawful agreements forcing buyers to agree to concessions favorable to the underwriters, noting, inter alia, that conduct lawful under the securities laws would be proscribed by antitrust principles. Id. at 2396. Taken as a whole, these recent cases point to the Court's concern that liability for alleged business defalcations and proprieties be carefully and narrowly construed.

That same narrow construction should obtain in the criminal law context. Scienter requirements should be more severe where personal liberties are at stake. And conduct lawful at the time of contract should not be twisted into prosecutable fraud because of later non-performance.

CONCLUSION

The Petition for a Writ of Certiorari should be granted. In addition, Petitioner adopts the certiorari Petitions filed by Petitioner's Co-Defendants, Wilfredo Umpierre, Lorenzo Munoz-Franco and Francisco Sanchez-Aran and urges certiorari be granted on the basis of the arguments therein as well.

Respectfully submitted,

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